No. 82-1795

In the Supreme Court of the United States

October Term 1983

CAPITAL CITIES CABLE, INC., et al.,
Petitioners,

vs.

RICHARD A. CRISP, DIRECTOR, ALCOHOLIC BEVERAGE CONTROL BOARD,
Respondent.

BRIEF OF THE STATE OF MISSISSIPPI AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

The State of Mississippi has adopted a statutory and regulatory scheme prohibiting certain advertisements of alcoholic beverages similar to, but not identical with, the provisions of the Constitution and laws of the State of Oklahoma under attack here. The pertinent provisions of Mississippi law are Sections 67-1-37(e), 67-1-85, and

97-31-1 of the Mississippi Code Annotated of 1972, as implemented by Regulation No. 6 of the Alcoholic Beverage Control Division of the Mississippi State Tax Commission.

Persons and corporations asserting a right to advertise liquor in Mississippi filed suits in the United States District Courts for the Northern and Southern Districts of Mississippi claiming that the Mississippi statutes unconstitutionally abridged plaintiffs' "commercial speech" rights to advertise liquor. The District Courts reached opposite conclusions. *Dunagin v. City of Oxford,* 489 F.Supp. 763 (N.D. Miss., 1980) (upholding); *Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Commission,* 539 F. Supp. 817 (S.D. Miss., 1982) (invalidating). On consolidated appeals, a panel of the Court of Appeals for the Fifth Circuit rendered an opinion holding the Mississippi statutes and regulation to be unconstitutional. *Dunagin v. City of Oxford,* 701 F.2d 314 (5 Cir., 1983). However, on a rehearing *en banc,* the Fifth Circuit reversed the panel opinion, and held the Mississippi statutes and regulation to be constitutional. *Dunagin v. City of Oxford,* 718 F.2d 738 (5 Cir., Nos. 80-3762, 82-4076, October 31, 1983).

The State of Mississippi has a substantial interest in upholding the validity of its statutes, and, in furtherance of that interest, respectfully submits this Brief in support of the right of the State of Oklahoma to regulate and prohibit the advertisement of liquor and wine.

SUMMARY OF ARGUMENT

The police power of Oklahoma over the traffic in liquor, and all of its incidents, including advertising, augumented by the Twenty-First Amendment, outweighs any

attenuated First Amendment right to advertise liquor. The Twenty-First Amendment, and the police power underlying it, also impacts this case because the appropriate standard of review in cases of this type is the more deferential "rational relationship" test, not the typical "strict scrutiny" test applicable to many First Amendment cases.

If this Court should apply the four-prong test utilized by the Court in *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), for the purpose of analyzing and deciding a "commercial speech" case, the Oklahoma prohibition of liquor advertising should be upheld. For purposes of this argument, the advertisement of liquor in Oklahoma is protected commercial speech. There is no dispute that the asserted governmental interest of Oklahoma in prohibiting the advertising of alcoholic beverages, so as to reduce the problems associated with alcohol abuse, is substantial. The third element of the *Central Hudson* test, which is whether the regulation directly advances the governmental interest asserted, is disputed by the parties, and is critical to a correct analysis of *Central Hudson*. It is Mississippi's position that the Oklahoma ban on liquor advertising does directly advance the State's unquestioned governmental interest. Prior decisions of this Court and common-sense reasoning make it manifest that the primary purpose and effect of advertising is to increase sales by stimulating consumption. The Oklahoma laws easily pass the fourth *Central Hudson* test, which is whether the regulation is more extensive than is necessary to serve the State's interest. Any regulation which resulted in a less than total prohibition of liquor advertising would render such regulation ineffective.

ARGUMENT

I.

THE POLICE POWER OF OKLAHOMA TO CONTROL LIQUOR, AUGMENTED BY THE TWENTY-FIRST AMENDMENT, IS AN ADEQUATE BASIS FOR UPHOLDING THE LAWS OF THAT STATE.

Mississippi requests the Court to focus on the nature of the product sought to be advertised in this "commercial speech" case. The product is intoxicating liquors. We believe that the nature of this product goes to the core of the question of whether those who wish to advertise it have a constitutionally-protected right to do so. Because of its harmful effects when abused, the states have always possessed unique, absolute police power to control liquor and all its incidents. The states have the judicially recognized police power to absolutely prohibit the whole business of liquor and the power to control it to any lesser degree that is not irrational.

We ask the Court to recognize that the State has enhanced police power over liquor due to liquor's harmful effects when used habitually. After factoring in liquor's harmful nature and the consequent enhanced authority to control its consumption and abuse to the point of prohibition, it is clear that the umbrella of "commercial speech", which is afforded only "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values[1]," is not large enough to include protection for liquor advertising. An examination of the entire historical development of commercial speech reveals

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1. *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 456 (1978).

that this court's decisions granting commercial speech protection have always dealt with beneficial or constitutionally protected products and activities and have never legitimized the advertising of any chemically addictive products that are harmful beyond dispute such as liquor, over which the state has absolute control. *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 570 (1980) (Promotional advertising by electric utility of electrical use; Court placed emphasis on finding that "appellants would advertise products and services that use energy efficiently."); *Bates v. State Bar Association*, 433 U.S. 350, 376 (1977) (Lawyer price advertising; Court pointed out that "restrained advertising would 'facilitate the process of intelligent selection of lawyers, and . . . assist in making legal services fully available.'"); *Carey v. Population Services International*, 431 U.S. 678, 701 (1977) (Contraceptive advertising; Court emphasized that such advertising was protected since it is "related to activity with which, at least in some respects, the State could not interfere."); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 96 (1977) (Property "for sale" signs; Court stated that such signs "are of vital interest to Willingboro residents, since it may bear on one of the most important decisions they have to make: where to live and raise their families."); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763, 764 (1976) (Prescription drug price advertisements; Court emphasized that "drug prices . . . could mean the alleviation of physical pain or the enjoyment of basic necessities" to the "poor, the sick, and particularly the aged."); *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975) (Advertisements of legal abortion services in another state; Court pointed out that abortion ad "contained factual material of 'clear public interest'" and that the "activity advertised pertained to constitutional interests."

Just as the decisions granting commercial speech protection have emphasized the product or activity's benefit to the public, so the decisions that have denied First Amendment protection have emphasized the harmful nature of the activity. For example, in *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978), this Court expressly stated that "neither *Virginia Pharmacy* nor *Bates* purported to cast doubt" on the fact that the "state does not lose its power to regulate commercial activity being harmful to the public whenever speech is a component of the activity." *Id.* at 456. *Accord Friedman v. Rogers*, 440 U.S. 1, 10, n.9.

Most importantly, when the Supreme Court has had occasion to address the commercial speech right to advertise liquor, and the analogous products of cigarettes and narcotics, the Court has invariably denied First Amendment protection and given the issue short shrift. *Queensgate Investment Co. v. Liquor Control Commission*, 69 Ohio St. 2d 361, 433 N.E.2d 138, *appeal dismissed*, 74 L.Ed.2d 45 (1982), in which this Court summarily dismissed an appeal on the ground that a liquor price advertistising ban did not violate commercial speech rights of the advertiser, is authority for Oklahoma in this case. Furthermore, *Capital Broadcasting Co. v. Mitchell*, 333 F.Supp. 582 (D.D.C. 1971) (three judge court), *aff'd sub. nom. Capital Broadcasting Co. v. Acting Attorney General*, 405 U.S. 1000 (1972), and *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), which upheld bans on advertising of cigarettes and drug paraphernalia, respectively, against commercial speech challenges, are also constitutionally indistinguishable from the instant case and further support the constitutionality of the Oklahoma laws.

It is significant that in cases decided within the context of a conflict between asserted "commercial speech"

rights and the power of the states to control the liquor traffic and all its incidents, this Court has upheld the State regulations based not only on the state's police power, but on the "added presumption in favor of the validity of the state regulation conferred by the Twenty-first Amendment." *New York State Liquor Authority v. Ballanca*, 452 U.S. 714, 718 (1981); and, *California v. LaRue*, 409 U.S. 109, 118 (1972).

Under *Ballanca*, *LaRue* and numerous other First Amendment—Twenty-first Amendment decisions, liquor laws are subjected to the minimum standard of constitutional review—the rational relation test. Under this relaxed, deferential analysis, the challenged statutes must be upheld "unless [they are] so unrelated to the achievement of any combination of legitimate purposes that [the court] can only conclude that the legislature's actions were *irrational*." *Vance v. Bradley*, 440 U.S. 93, 97 (1979) (emphasis added). *See California v. LaRue*, 409 U.S. 109, 118-19 (1972).

Clearly, under the rational relation test, "the state is not compelled to verify logical assumptions with statistical evidence" or with "current empirical proof". *Vance v. Bradley*, 440 U.S. 93, 110 (1979); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 812 (1976). As long as a relationship of the statutes to the asserted interest "is at least debatable," they are not unconstitutional. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981). This Court stated in *Minnesota v. Clover Leaf Creamery Co.*, *supra*:

> "States are not required to convince the courts of the correctness of their legislative judgments. Rather, those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably

be conceived to be true by the governmental decision-maker." *Id.*, page 464.

Applying this appropriate standard of review, the Oklahoma laws should be upheld against an attack based on asserted "commercial speech" rights.

It is basic that the plenary power of Oklahoma to regulate and control the liquor traffic includes and encompasses the power to regulate and control the incidents of the liquor traffic. This Court in its decision in *Ziffrin v. Reeves*, 308 U.S. 132 (1939), held that "the state may protect her people against evil incident to intoxicants . . . and may exercise large discretion as to means employed." *Id.*, pages 139-140.

In *Premier-Pabst Sales Co. v. State Board of Equalization*, 13 F.Supp. 90, 95-96 (S.D. Cal., 1935) (three-judge court), the Court explicitly held that advertising is one of the incidents to the sale of liquor which the State can prohibit and control.

II.

THE OKLAHOMA LAWS SHOULD BE UPHELD AS CONSTITUTIONAL IF THE CENTRAL HUDSON TEST IS APPLIED.

If this Court should decide not to uphold the Oklahoma laws on the bases presented in Argument I of this brief, Mississippi submits that, using appropriate criteria, the Oklahoma laws should still be held to be valid.

This Court, in *Central Hudson Gas and Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), articulated a four-part analysis to be used in deciding traditional "commercial speech" cases. The Court stated the test as follows:

> "In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Id.*, page 566.

For purposes of this argument, the advertisement of liquor in Oklahoma is protected commercial speech. There is no dispute that the asserted governmental interest of Oklahoma in prohibiting the advertising of alcoholic beverages, so as to reduce the problems associated with alcohol abuse, is substantial. The third element of the *Central Hudson* test, which is whether the regulation directly advances the governmental interest asserted, is disputed by the parties, and is critical to a correct analysis of *Central Hudson*. It is Mississippi's position that the Oklahoma ban on liquor advertising does directly advance the State's unquestioned governmental interest.

On the basis of common-sense reasoning, it is generally recognized that the purpose and effect of advertising is to increase sales by stimulating consumption. This Court in relevant "commercial speech" cases has taken cognizance of this well known fact. In *Central Hudson*, *supra*, this Court made the following finding:

> "There is an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising ban unless it be-

lieved that promotion would increase its sales. Thus, we find a direct link between the state interest in conservation and the Commissioner's order." *Id.*, page 569.

Those who wish to advertise liquor attempt to evade this pertinent finding of the Court on the basis that the subject matter of the advertisement in *Central Hudson* was electricity, which is a monopoly. Such efforts are to no avail, because this Court sufficiently dealt with that contention in its *Central Hudson* opinion in the following language:

"Monopoly over the supply of a product provides no protection from competition with substitutes for that product. Electric utilities compete with suppliers of fuel oil and natural gas in several markets, such as those for home heating and industrial power. This Court noted the existence of inter-fuel competition 45 years ago, *see West Ohio Gas Co. v. Public Utilities Comm'n*, 294 U.S. 63, 72, 55 S.Ct. 316, 321, 79 L.Ed. 761 (1935). Each energy source continues to offer peculiar advantages and disadvantages that may influence consumer choice." *Id.*, page 567.

The opinion of this Court in the "commercial speech" case of *Metro Media, Inc. v. San Diego*, 453 U.S. 490 (1981), is also instructive. In that case, this Court stated:

"The more serious question, then, concerns the third of the Central Hudson criteria: Does the ordinance 'directly advance' governmental interests in traffic safety and in the appearance of the city? It is asserted that the record is inadequate to show any connection between billboards and traffic safety. The California Supreme Court noted the meager record on this point but held 'as a matter of law that an ordi-

nance which eliminates billboards designed to be viewed from streets and highways reasonably relates to traffic safety.' 26 Cal. 3d, at 859, 610 P.2d, at 412. Noting that '[b]illboards are intended to, and undoubtedly do, divert a driver's attention from the roadway', *ibid.*, and that whether the 'distracting effect contributes to traffic accidents invokes an issue of continuing controversy', *ibid.*, the California Supreme Court agreed with many other courts that a legislative judgment that billboards are traffic hazards is not manifestly unreasonable and should not be set aside. We likewise hesitate to disagree with the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety. There is nothing here to suggest that these judgments are unreasonable. As we said in a different context, *Railway Express Agency, Inc. v. New York, supra*, at 109, 93 L.Ed. 533, 69 S.Ct. 463:

> 'We would be trespassing on one of the most intensely local and specialized of all municipal problems if we held that this regulation had no relation to the traffic problem of New York City. It is the judgment of the local authorities that it does have such a relation. And nothing has been advanced which shows that to be palpably false.' "

Id., pages 508-509 (footnote omitted).

Based on the above case authorities and reasoning, Mississippi submits that the Oklahoma laws pass the critical third element of the *Central Hudson* test.

As to the fourth *Central Hudson* element, which is whether the regulation is not more extensive than is necessary to serve the governmental interest, it is plain that

the Oklahoma laws pass this test. We can do no better than to paraphrase the language used by this Court in *Metromedia, Inc. v. San Diego, supra,* 453 U.S., at page 508, in its analysis of the fourth part of the *Central Hudson* test. We would paraphrase the statement of the Court in *Metromedia, Inc. v. San Diego, supra,* as follows: If the state has a sufficient basis for believing that advertising liquor results in stimulating consumption of liquor, then, obviously, the most direct and perhaps the only effective approach to solving the problems such advertising creates is to prohibit it.

CONCLUSION

The State of Oklahoma, by referendum vote of its electorate, has made a decision to prohibit the advertisement of liquor and wine. *Amicus* respectfully submits that that solemn decision should not be invalidated by this Court.

Dated December 13th, 1983.

Respectfully submitted,

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